

## **Council hasn't approved my DA - What should I do?**

This is probably the most common question asked of planning lawyers and an experience most people would prefer to avoid.

The refusal, or "failure", to give a consent to a development application ("**DA**") by consent authorities (usually local councils) can have a very personal impact on applicants who are often not professional developers and are not familiar with the world of councils and developments. For professional developers a refusal, or failure, can have serious financial consequences and the time and cost of further pursuing a development consent can make a once viable project unviable.

Applicants applying for a new home are often bewildered by how difficult and emotional the process can be when consent is not granted to their DA, especially where there are, what look like, similar homes nearby.

Seasoned developers usually have a more direct way of dealing with councils and are more circumspect when their DA is not progressing however their experience does not make it any easier financially.

Despite what you might expect, there is no legal obligation on councils to make a decision on a DA and sometimes DAs can remain undecided for... ever.

Some councils prefer asking applicants to withdraw their DAs rather than assessing them.

There are other, mostly political, pressures for councils to act, but, practically, a council can not be forced to make a decision one way or the other on a DA.

Adversarial communications should always be avoided as it creates a barrier to dealing with what might be very real issues with the proposed development. Councils and their officers are well aware of appeal rights and it is usually not helpful to remind them of those rights.

### **So what do you do if your DA has been refused or has not been determined by your local council?**

First, take a long hard look at your DA

Whether your development is for an extension to your home or a large scale commercial development the first step should be to take a long & critical look at your DA.

This means looking at:

- any reasons the council has for not approving the DA - consider whether it would be worthwhile applying for access to council's file relating to the DA. Councils usually have a downloadable form on their websites providing for informal access without charge (photocopying excluded) under the Government Information (Public Access) Act. For minimal, or no, cost other than time, this can be a source of very useful information;
- advice from your architect and other consultants on any areas they believe could improve your chances of an approval from the council without overly compromising your proposed development;

- any areas where your DA does not comply with council's planning documents; and
- although this may be hard to do, if there are vocal neighbours objecting to your DA and this is impacting on the council's assessment, then it would be good to meet them if possible to understand why they object - maybe their issue can be easily addressed or they don't completely understand your DA and the impacts.

#### Amend your plans if it helps get you where you want to be

At the very least, a review and amended plans may help you address some, if not all, of the issues and may lead to development consent for your DA. Time and effort spent at this point is almost never wasted and can save a lot of time, money and heartache down the track.

It is not always the case that plans will need to be amended after your review to help obtain development consent, but, sometimes, minor amendments, or a complete re-think with amended plans or even a new DA may be the best approach to have a good chance of obtaining consent.

What is important though is that you go through the process, because if it becomes unlikely that any consent will be issued by the council then appeal options may have to be considered. It is better to review now rather than halfway through a court case.

#### Check what options are available for the Council to have a re-think

Before you do consider appeal options to the Land & Environment court ("**L&E Court**") it is a good idea, in respect of a refused DA at least, to check whether your council has any internal review procedures. Although sometimes these can be a waste of time; they are rarely costly options; they don't prevent you taking other action; and they can, in some cases, lead to a good outcome.

An example is the City of Sydney Council which has an appeal panel which regularly meets to re-consider DAs.

In one particular DA lodged with the City of Sydney Council which was approved but with conditions that substantially limited the development to the extent it was not viable, the panel listened to our argument. The Deputy Mayor at the time volunteered to attend the site with the panel and discuss options for an amended design. The members of the panel attended the site and within half an hour a proposal satisfactory to both the applicant and the Council was worked out - amended plans were lodged and a consent was issued fairly quickly by the Council.

There are also more formal review options available required under legislation where a refused DA, or a consent to a DA with challenging conditions can be re-assessed by a different Council planning officer (or the Council if the Council made the original decision) under a section 82A review (s82A of the Environmental Planning & Assessment Act, 1979 NSW ("**the Act**")). A refused modification application (also known as a section 96 application) can also be reviewed under s96A of the Act.

The cost of s82A applications are relatively low and the odds of success are high according to the Local Development Performance Monitoring Report 2011-2012 which found that 70% of section 82A reviews were approved by councils with 18% refused in 2011-2012 (see link to this and the latest

reports from the Department of Planning & Infrastructure (<http://www.planning.nsw.gov.au/en-au/developmentproposals/performancemonitoring.aspx>)

One risk area with these types of reviews is that it is technically possible to end up with a "worse" consent after the review however if you have an unworkable consent then this is probably not a real risk. It may even be possible to amend plans as part of a s82A review application subject to the amended plans being substantially the same as those originally assessed.

#### Want to go to Court?

If you are considering appeal options to the L&E Court then, unless you have the luxury of time (and money), you will want to proceed with the best DA possible. There are limited opportunities to amend your plans once an appeal to the L&E Court is commenced and if you are able to amend then it will be at greater cost than before an appeal.

If you are interested in appeal options beyond the relevant council then please click [here](#) which will link to another summary paper "[I want to go to the Land & Environment Court!](#)".

#### Time limits!

There are time limits for lodging s82A review applications, s96AB review applications and commencing L&E Court proceedings. These time limits are strict and it is recommended that advice is sought on the time limits that apply so that any review or appeal rights are not lost.

Eakin McCaffery Cox Lawyers can help by advising you through the DA process and available options as well as acting as your legal representatives in L&E Court proceedings on a cost effective basis.

Please contact **Eakin McCaffery Cox Lawyers on (02) 9265 3000** for advice and action on planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice. Each development application is different and is made in different circumstances which require subjective assessment before legal advice may be provided.